

AMENDED IN SENATE SEPTEMBER 2, 2009

AMENDED IN ASSEMBLY JUNE 1, 2009

AMENDED IN ASSEMBLY MARCH 31, 2009

CALIFORNIA LEGISLATURE—2009—10 REGULAR SESSION

**ASSEMBLY BILL**

**No. 1087**

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**Introduced by Assembly Member Ma**

February 27, 2009

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An act to amend *Section 10286.1 of the Public Contract Code, and to amend Sections 6011 and 6012 of the Revenue and Taxation Code, relating to taxation.*

LEGISLATIVE COUNSEL'S DIGEST

AB 1087, as amended, Ma. State Board of Equalization: sales and use taxes: administration: transportation charges: *public contracts with expatriate corporations: tax treaty.*

The Sales and Use Tax Law imposes a tax on retailers measured by gross receipts from the sale of tangible personal property sold at retail in this state, or on the storage, use, or other consumption in this state of tangible personal property purchased from a retailer for storage, use, or other consumption in this state, measured by the sales price of the property. That law provides various exclusions from gross receipts and sales price, including an exclusion for separately stated charges for transportation from the retailer's place of business or other point from which shipment is made directly to the purchaser, as specified.

This bill would state that charges for transportation are separately stated when stated as a single amount and not combined in a single amount with other charges.

*Existing law regarding contracting between state agencies and private contractors sets forth requirements for the procurement of materials, supplies, equipment, and services by state agencies. Existing law sets out the various responsibilities of the Department of General Services, and other state agencies, in overseeing and implementing state contracting procedures and policies. Existing law prohibits a state agency from entering into any contract with an expatriate corporation, as defined, or its subsidiary, unless certain conditions are met. Existing law defines an expatriate corporation as a foreign incorporated entity that is publicly traded in the United States and that meets specified criteria.*

*This bill would revise the definition of an expatriate corporation to also require that the entity be domiciled in a jurisdiction that does not have an income tax treaty with the United States.*

Vote: majority. Appropriation: no. Fiscal committee: yes.  
State-mandated local program: no.

*The people of the State of California do enact as follows:*

- 1     *SECTION 1. It is the intent of the Legislature in enacting this*  
2     *act to clarify that a state agency shall not enter into any contract*  
3     *with an expatriate corporation located in a foreign jurisdiction*  
4     *that does not have an income tax treaty with the United States.*  
5     *SEC. 2. Section 10286.1 of the Public Contract Code is*  
6     *amended to read:*  
7     10286.1. (a) For purposes of this part, except as otherwise  
8     provided in subdivisions (b) and (c), a state agency shall not enter  
9     into any contract with an expatriate corporation or its subsidiaries.  
10    (b) (1) For purposes of this article, an “expatriate corporation”  
11    means a foreign incorporated entity that is publicly traded in the  
12    United States to which all of the following apply:  
13    (A) The United States is the principal market for the public  
14    trading of the foreign incorporated entity.  
15    (B) The foreign incorporated entity has no substantial business  
16    activities in the place of incorporation.  
17    (C) *The foreign incorporated entity is domiciled in a jurisdiction*  
18    *that does not have an income tax treaty with the United States.*  
19    ~~(C)~~  
20    (D) Either clause (i) or clause (ii) applies:

1 (i) The foreign entity was established in connection with a  
2 transaction or series of related transactions pursuant to which (I)  
3 the foreign entity directly or indirectly acquired substantially all  
4 of the properties held by a domestic corporation or all of the  
5 properties constituting a trade or business of a domestic partnership  
6 or related foreign partnership, and (II) immediately after the  
7 acquisition, more than 50 percent of the publicly traded stock, by  
8 vote or value, of the foreign entity is held by former shareholders  
9 of the domestic corporation or by former partners of the domestic  
10 partnership or related foreign partnership. For purposes of  
11 subclause (II), any stock sold in a public offering related to the  
12 transaction or a series of transactions is disregarded.

13 (ii) The foreign entity was established in connection with a  
14 transaction or series of related transactions pursuant to which (I)  
15 the foreign entity directly or indirectly acquired substantially all  
16 of the properties held by a domestic corporation or all of the  
17 properties constituting a trade or business of a domestic partnership  
18 or related foreign partnership, and (II) the acquiring foreign entity  
19 is more than 50 percent owned, by vote or value, by domestic  
20 shareholders or partners.

21 (iii) For purposes of this subparagraph, indirect acquisition of  
22 property includes the acquisition of a stock share, or any portion  
23 thereof, of the owner of that property.

24 (2) Notwithstanding subdivision (a), a state agency may contract  
25 with an expatriate corporation, or its subsidiary, if it was an  
26 expatriate corporation before January 1, 2004, to which both of  
27 the following apply:

28 (A) The foreign entity provides, by operation of law, by  
29 provisions of its governing documents, by resolution of its board  
30 of directors, or in any other manner, at least the following  
31 shareholders' rights:

32 (i) Shareholders of the entity have the right to inspect, at a  
33 principal place of business in the United States, copies of the  
34 entity's books and records, including, but not limited to,  
35 shareholder names, addresses, and shareholdings in accordance  
36 with the corporation law, as amended from time to time and as  
37 that law is interpreted by the courts, of the United States  
38 jurisdiction in which the entity was previously incorporated, or, if  
39 the entity was not previously incorporated, in accordance with the  
40 terms set forth in the Model Business Corporation Act, as that act

1 may be amended from time to time, provided that, if the corporate  
2 law of the United States jurisdiction in which the entity was  
3 previously incorporated or the Model Business Corporation Act  
4 does not provide access to the shareholder names, addresses, and  
5 shareholdings, these books and records are available for inspection  
6 by shareholders for purposes properly related to their status as  
7 shareholders of the entity.

8 (ii) The entity permits its shareholders to bring derivative  
9 proceedings on behalf of the entity, provided that these derivative  
10 proceedings are brought on a basis and under the terms applicable  
11 under the law, as amended from time to time and as interpreted  
12 by, or required by, the courts of the United States jurisdiction in  
13 which the entity was previously incorporated, or, if the entity was  
14 not previously incorporated, on a basis and under the terms set  
15 forth in the Model Business Corporations Act as that act may be  
16 amended from time to time and as it is interpreted by, or required  
17 by, the courts.

18 (iii) Entity transactions in which any director is interested are  
19 approved in accordance with the applicable law, as amended from  
20 time to time and as interpreted by the courts, of the United States  
21 jurisdiction in which the entity was previously incorporated, or, if  
22 the entity was not previously incorporated, in accordance with the  
23 terms set forth in the Model Business Corporations Act, as may  
24 be amended from time to time and as interpreted by the courts.

25 (iv) The entity has consented to the jurisdiction, for any  
26 otherwise available cause of action by or on behalf of the entity's  
27 shareholders, including any pendent state causes of action, of all  
28 of the following courts:

29 (I) The state courts of one or more states.

30 (II) The United States federal courts in any state in which the  
31 entity consents to the jurisdiction of that state's courts pursuant to  
32 subclause (I).

33 (v) The entity has appointed an agent for service of process in  
34 the state or states in which the entity has consented to jurisdiction,  
35 as described in clause (iv), and the entity meets at least one of the  
36 following conditions:

37 (I) The entity has unencumbered assets in the United States,  
38 which assets may include equity or debt investments in United  
39 States companies, with a book value in excess of fifty million  
40 dollars (\$50,000,000), and the entity delivers to the Secretary of

1 State an opinion of an attorney licensed in the United States that  
2 judgments rendered against the entity may be satisfied by using  
3 these assets.

4 (II) The entity posts a bond or similar security in an amount of  
5 at least fifty million dollars (\$50,000,000).

6 (III) The entity has directors' and officers' insurance in an  
7 amount of at least fifty million dollars (\$50,000,000).

8 (vi) The entity agrees that, in connection with any lawsuit  
9 brought against it by its shareholders in any court in which the  
10 entity has consented to jurisdiction as described in clause (iv), the  
11 entity will provide to the court notice of the manner in which the  
12 entity complied with clause (v) and, if the entity complied with  
13 that clause in the manner specified in subclause (I) of clause (v),  
14 a copy of the opinion described in that subclause.

15 (vii) Shareholder approval is required for any sale of all or  
16 substantially all of the entity's assets in accordance with the law,  
17 as amended from time to time and as it is interpreted by the courts,  
18 of the United States jurisdiction in which it was previously  
19 incorporated, or, if it was not previously incorporated, in  
20 accordance with the terms set forth in the Model Business  
21 Corporations Act, as it may be amended from time to time.

22 (viii) The directors and officers of the entity occupy a fiduciary  
23 relationship with the entity and its shareholders and these directors  
24 and officers, in performing their duties, act in good faith in a  
25 manner that a director or officer believes to be in the best interests  
26 of the entity and its shareholders, as that standard of care is  
27 interpreted by the courts.

28 (ix) The entity agrees to hold no more than one of every four  
29 annual shareholder meetings in a location outside the United States  
30 and, in the event that the entity holds an annual meeting outside  
31 the United States, the entity agrees to provide access to that meeting  
32 through a Web cast or other technology that allows the entity's  
33 shareholders to do both of the following:

34 (I) Listen to the meeting, watch the meeting, or both.

35 (II) Send questions that will be addressed at the meeting.

36 (x) The entity provides a description of the shareholder rights  
37 described in clauses (i) to (ix), inclusive, and any subsequent  
38 changes to these rights, on the entity's Web site or in its 10K filings  
39 with the United States Securities and Exchange Commission.

1 (B) The entity uses worldwide combined reporting to calculate  
2 the income on which it pays taxes to the state.

3 (c) The chief executive officer of a state agency or his or her  
4 designee may waive the prohibition specified in subdivision (a) if  
5 the executive officer or his or her designee has made a written  
6 finding that the contract is necessary to meet a compelling public  
7 interest. For purposes of this section, a “compelling public interest”  
8 includes, but is not limited to, ensuring the provision of essential  
9 services, ensuring the public health and safety, or an emergency  
10 as defined in Section 1102. If a waiver is granted to a vendor  
11 pursuant to this subdivision, the requirement to submit a declaration  
12 of compliance, as set forth in paragraph (1) of subdivision (d),  
13 does not apply to that vendor.

14 (d) (1) For purposes of this chapter, “state agency” means every  
15 state office, department, division, bureau, board, commission, and  
16 the California State University, but does not include the University  
17 of California, the Legislature, the courts, or any agency in the  
18 judicial branch of government.

19 (2) On or after January 1, 2004, all state agencies shall, as a  
20 condition of the contract, require any vendor that is offered a  
21 contract to do business with the state to submit a declaration stating  
22 that the vendor is eligible to contract with the state pursuant to this  
23 section.

24 (3) A vendor that declares as true any material matter in a  
25 declaration described in this subdivision that he or she knows to  
26 be false is guilty of a misdemeanor.

27 (e) (1) Except as provided in paragraph (2) and subdivision (f),  
28 this section applies to contracts that are entered into on or after  
29 January 1, 2004.

30 (2) With respect to an entity that was an expatriate corporation,  
31 as defined in paragraph (1) of subdivision (b), before January 1,  
32 2004, this section applies to contracts that are entered into on or  
33 after April 1, 2004.

34 (f) (1) The declaration requirement set forth in subdivision (d)  
35 does not apply to a credit card purchase of goods of two thousand  
36 five hundred dollars (\$2,500) or less.

37 (2) The total amount of exemption authorized herein shall not  
38 exceed seven thousand five hundred dollars (\$7,500) per year for  
39 each company from which a state agency is purchasing goods by  
40 credit card. It shall be the responsibility of each state agency to

1 monitor the use of this exemption and adhere to these restrictions  
2 on these purchases.

3 **SECTION 4.**

4 *SEC. 3.* Section 6011 of the Revenue and Taxation Code is  
5 amended to read:

6 6011. (a) "Sales price" means the total amount for which  
7 tangible personal property is sold or leased or rented, as the case  
8 may be, valued in money, whether paid in money or otherwise,  
9 without any deduction on account of any of the following:

- 10 (1) The cost of the property sold.  
11 (2) The cost of materials used, labor or service cost, interest  
12 charged, losses, or any other expenses.  
13 (3) The cost of transportation of the property, except as excluded  
14 by other provisions of this section.

15 (b) The total amount for which the property is sold or leased or  
16 rented includes all of the following:

- 17 (1) Any services that are a part of the sale.  
18 (2) Any amount for which credit is given to the purchaser by  
19 the seller.  
20 (3) The amount of any tax imposed by the United States upon  
21 producers and importers of gasoline and the amount of any tax  
22 imposed pursuant to Part 2 (commencing with Section 7301) of  
23 this division.

24 (c) "Sales price" does not include any of the following:

- 25 (1) Cash discounts allowed and taken on sales.  
26 (2) The amount charged for property returned by customers  
27 when that entire amount is refunded either in cash or credit, but  
28 this exclusion shall not apply in any instance when the customer,  
29 in order to obtain the refund, is required to purchase other property  
30 at a price greater than the amount charged for the property that is  
31 returned. For the purpose of this section, refund or credit of the  
32 entire amount shall be deemed to be given when the purchase price  
33 less rehandling and restocking costs are refunded or credited to  
34 the customer. The amount withheld for rehandling and restocking  
35 costs may be a percentage of the sales price determined by the  
36 average cost of rehandling and restocking returned merchandise  
37 during the previous accounting cycle.  
38 (3) The amount charged for labor or services rendered in  
39 installing or applying the property sold.

1 (4) (A) The amount of any tax (not including, however, any  
2 manufacturers' or importers' excise tax, except as provided in  
3 subparagraph (B)) imposed by the United States upon or with  
4 respect to retail sales whether imposed upon the retailer or the  
5 consumer.

6 (B) The amount of manufacturers' or importers' excise tax  
7 imposed pursuant to Section 4081 or 4091 of the Internal Revenue  
8 Code for which the purchaser certifies that he or she is entitled to  
9 either a direct refund or credit against his or her income tax for  
10 the federal excise tax paid or for which the purchaser issues a  
11 certificate pursuant to Section 6245.5.

12 (5) The amount of any tax imposed by any city, county, city  
13 and county, or rapid transit district within the State of California  
14 upon or with respect to retail sales of tangible personal property,  
15 measured by a stated percentage of sales price or gross receipts,  
16 whether imposed upon the retailer or the consumer.

17 (6) The amount of any tax imposed by any city, county, city  
18 and county, or rapid transit district within the State of California  
19 with respect to the storage, use or other consumption in that city,  
20 county, city and county, or rapid transit district of tangible personal  
21 property measured by a stated percentage of sales price or purchase  
22 price, whether the tax is imposed upon the retailer or the consumer.

23 (7) Separately stated charges for transportation from the  
24 retailer's place of business or other point from which shipment is  
25 made directly to the purchaser, but the exclusion shall not exceed  
26 a reasonable charge for transportation by facilities of the retailer  
27 or the cost to the retailer of transportation by other than facilities  
28 of the retailer. However, if the transportation is by facilities of the  
29 retailer, or the property is sold for a delivered price, this exclusion  
30 shall be applicable solely with respect to transportation which  
31 occurs after the purchase of the property is made. Charges for  
32 transportation are separately stated for the purposes of this  
33 paragraph if those charges are stated as a single amount and are  
34 not included within a single amount that combines transportation  
35 charges with other charges.

36 (8) Charges for transporting landfill from an excavation site to  
37 a site specified by the purchaser, either if the charge is separately  
38 stated and does not exceed a reasonable charge or if the entire  
39 consideration consists of payment for transportation.



1 (9) The amount of any motor vehicle, mobilehome, or  
2 commercial coach fee or tax imposed by and paid the State of  
3 California that has been added to or is measured by a stated  
4 percentage of the sales or purchase price of a motor vehicle,  
5 mobilehome, or commercial coach.

6 (10) (A) The amount charged for intangible personal property  
7 transferred with tangible personal property in any technology  
8 transfer agreement, if the technology transfer agreement separately  
9 states a reasonable price for the tangible personal property.

10 (B) If the technology transfer agreement does not separately  
11 state a price for the tangible personal property, and the tangible  
12 personal property or like tangible personal property has been  
13 previously sold or leased, or offered for sale or lease, to third  
14 parties at a separate price, the price at which the tangible personal  
15 property was sold, leased, or offered to third parties shall be used  
16 to establish the retail fair market value of the tangible personal  
17 property subject to tax. The remaining amount charged under the  
18 technology transfer agreement is for the intangible personal  
19 property transferred.

20 (C) If the technology transfer agreement does not separately  
21 state a price for the tangible personal property, and the tangible  
22 personal property or like tangible personal property has not been  
23 previously sold or leased, or offered for sale or lease, to third  
24 parties at a separate price, the retail fair market value shall be equal  
25 to 200 percent of the cost of materials and labor used to produce  
26 the tangible personal property subject to tax. The remaining amount  
27 charged under the technology transfer agreement is for the  
28 intangible personal property transferred.

29 (D) For purposes of this paragraph, “technology transfer  
30 agreement” means any agreement under which a person who holds  
31 a patent or copyright interest assigns or licenses to another person  
32 the right to make and sell a product or to use a process that is  
33 subject to the patent or copyright interest.

34 (11) The amount of any tax imposed upon diesel fuel pursuant  
35 to Part 31 (commencing with Section 60001).

36 (12) (A) The amount of tax imposed by any Indian tribe within  
37 the State of California with respect to a retail sale of tangible  
38 personal property measured by a stated percentage of the sales or  
39 purchase price, whether the tax is imposed upon the retailer or the  
40 consumer.

(B) The exclusion authorized by subparagraph (A) shall only apply to those retailers who are in substantial compliance with this part.

~~SEC. 2.~~

SEC. 4. Section 6012 of the Revenue and Taxation Code is amended to read:

6012. (a) "Gross receipts" mean the total amount of the sale or lease or rental price, as the case may be, of the retail sales of retailers, valued in money, whether received in money or otherwise, without any deduction on account of any of the following:

(1) The cost of the property sold. However, in accordance with any rules and regulations as the board may prescribe, a deduction may be taken if the retailer has purchased property for some other purpose than resale, has reimbursed his or her vendor for tax which the vendor is required to pay to the state or has paid the use tax with respect to the property, and has resold the property prior to making any use of the property other than retention, demonstration, or display while holding it for sale in the regular course of business. If that deduction is taken by the retailer, no refund or credit will be allowed to his or her vendor with respect to the sale of the property.

(2) The cost of the materials used, labor or service cost, interest paid, losses, or any other expense.

(3) The cost of transportation of the property, except as excluded by other provisions of this section.

(4) The amount of any tax imposed by the United States upon producers and importers of gasoline and the amount of any tax imposed pursuant to Part 2 (commencing with Section 7301) of this division.

(b) The total amount of the sale or lease or rental price includes all of the following:

(1) Any services that are a part of the sale.

(2) All receipts, cash, credits and property of any kind.

(3) Any amount for which credit is allowed by the seller to the purchaser.

(c) "Gross receipts" do not include any of the following:

(1) Cash discounts allowed and taken on sales.

(2) Sale price of property returned by customers when that entire amount is refunded either in cash or credit, but this exclusion shall not apply in any instance when the customer, in order to obtain

1 the refund, is required to purchase other property at a price greater  
2 than the amount charged for the property that is returned. For the  
3 purpose of this section, refund or credit of the entire amount shall  
4 be deemed to be given when the purchase price less rehandling  
5 and restocking costs are refunded or credited to the customer. The  
6 amount withheld for rehandling and restocking costs may be a  
7 percentage of the sales price determined by the average cost of  
8 rehandling and restocking returned merchandise during the  
9 previous accounting cycle.

10 (3) The price received for labor or services used in installing or  
11 applying the property sold.

12 (4) (A) The amount of any tax (not including, however, any  
13 manufacturers' or importers' excise tax, except as provided in  
14 subparagraph (B)) imposed by the United States upon or with  
15 respect to retail sales whether imposed upon the retailer or the  
16 consumer.

17 (B) The amount of manufacturers' or importers' excise tax  
18 imposed pursuant to Section 4081 or 4091 of the Internal Revenue  
19 Code for which the purchaser certifies that he or she is entitled to  
20 either a direct refund or credit against his or her income tax for  
21 the federal excise tax paid or for which the purchaser issues a  
22 certificate pursuant to Section 6245.5.

23 (5) The amount of any tax imposed by any city, county, city  
24 and county, or rapid transit district within the State of California  
25 upon or with respect to retail sales of tangible personal property  
26 measured by a stated percentage of sales price or gross receipts  
27 whether imposed upon the retailer or the consumer.

28 (6) The amount of any tax imposed by any city, county, city  
29 and county, or rapid transit district within the State of California  
30 with respect to the storage, use or other consumption in that city,  
31 county, city and county, or rapid transit district of tangible personal  
32 property measured by a stated percentage of sales price or purchase  
33 price, whether the tax is imposed upon the retailer or the consumer.

34 (7) Separately stated charges for transportation from the  
35 retailer's place of business or other point from which shipment is  
36 made directly to the purchaser, but the exclusion shall not exceed  
37 a reasonable charge for transportation by facilities of the retailer  
38 or the cost to the retailer of transportation by other than facilities  
39 of the retailer. However, if the transportation is by facilities of the  
40 retailer, or the property is sold for a delivered price, this exclusion

1 shall be applicable solely with respect to transportation which  
2 occurs after the sale of the property is made to the purchaser.  
3 Charges for transportation are separately stated for the purposes  
4 of this paragraph if those charges are stated as a single amount and  
5 are not included within a single amount that combines  
6 transportation charges with other charges.

7 (8) Charges for transporting landfill from an excavation site to  
8 a site specified by the purchaser, either if the charge is separately  
9 stated and does not exceed a reasonable charge or if the entire  
10 consideration consists of payment for transportation.

11 (9) The amount of any motor vehicle, mobilehome, or  
12 commercial coach fee or tax imposed by and paid to the State of  
13 California that has been added to or is measured by a stated  
14 percentage of the sales or purchase price of a motor vehicle,  
15 mobilehome, or commercial coach.

16 (10) (A) The amount charged for intangible personal property  
17 transferred with tangible personal property in any technology  
18 transfer agreement, if the technology transfer agreement separately  
19 states a reasonable price for the tangible personal property.

20 (B) If the technology transfer agreement does not separately  
21 state a price for the tangible personal property, and the tangible  
22 personal property or like tangible personal property has been  
23 previously sold or leased, or offered for sale or lease, to third  
24 parties at a separate price, the price at which the tangible personal  
25 property was sold, leased, or offered to third parties shall be used  
26 to establish the retail fair market value of the tangible personal  
27 property subject to tax. The remaining amount charged under the  
28 technology transfer agreement is for the intangible personal  
29 property transferred.

30 (C) If the technology transfer agreement does not separately  
31 state a price for the tangible personal property, and the tangible  
32 personal property or like tangible personal property has not been  
33 previously sold or leased, or offered for sale or lease, to third  
34 parties at a separate price, the retail fair market value shall be equal  
35 to 200 percent of the cost of materials and labor used to produce  
36 the tangible personal property subject to tax. The remaining amount  
37 charged under the technology transfer agreement is for the  
38 intangible personal property transferred.

39 (D) For purposes of this paragraph, “technology transfer  
40 agreement” means any agreement under which a person who holds

1 a patent or copyright interest assigns or licenses to another person  
2 the right to make and sell a product or to use a process that is  
3 subject to the patent or copyright interest.

4 (11) The amount of any tax imposed upon diesel fuel pursuant  
5 to Part 31 (commencing with Section 60001).

6 (12) (A) The amount of tax imposed by any Indian tribe within  
7 the State of California with respect to a retail sale of tangible  
8 personal property measured by a stated percentage of the sales or  
9 purchase price, whether the tax is imposed upon the retailer or the  
10 consumer.

11 (B) The exclusion authorized by subparagraph (A) shall only  
12 apply to those retailers who are in substantial compliance with this  
13 part.

14 For purposes of the sales tax, if the retailers establish to the  
15 satisfaction of the board that the sales tax has been added to the  
16 total amount of the sale price and has not been absorbed by them,  
17 the total amount of the sale price shall be deemed to be the amount  
18 received exclusive of the tax imposed. Section 1656.1 of the Civil  
19 Code shall apply in determining whether or not the retailers have  
20 absorbed the sales tax.